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William G. Miller, Esq.
Staff Director
Select Committee on Intelligence
United States Senate
Washington, D. C. 20510

Dear Bill:

At our meeting earlier this month, I made known to you my negative views concerning the draft report of the Subcommittee on Secrecy and Disclosure entitled National Security Secrets: Their Proper Place in the Law. At the end of our meeting, you asked me to submit a written statement of my views. This letter is in response to your request.

The General Themes

The three-page preface of the draft report sets the tone for much of what is to follow. The points that come through are (a) that the administration of criminal justice is plagued by intelligence agency efforts to protect their secrets at any cost and (b) that the difficulties associated with the use of national security information in criminal cases have encouraged the belief among intelligence agency employees that they are above the law. Whatever validity these points may have had at some time in the past, they have none at present, at least in my judgment, and there is nothing in the report to indicate that the contrary is true.

The idea that some sort of an above-the-law attitude exists on the part of intelligence agency employees is introduced in the first full paragraph of page 3 of the draft report. A fuller flowering of the idea comes in section V, which bears the rather lurid title "To Kill... to Lie, Cheat and Spy," and which leads off with a quoted excerpt from the testimony of Phil Lacovara suggesting that "[p]eople...connected with intelligence information... have by virtue of immunity from prosecution something like a license not only to kill, but to lie, steal, cheat, and spy." It is true of course that CIA has "something like a license" to spy. For the rest, the notion that intelligence officials consider themselves free to engage in a wide range of illegal activities is totally at odds with my own perceptions.

As I see it, the problem lies in the opposite direction, and if anything we are too fearful of our legal liabilities rather than too confident of our immunities.

The idea that a secrecy-above-all-else position characterizes intelligence agency dealings with the Department of Justice is introduced in the second full paragraph on page 3, in which the central issue addressed by the report is framed in these terms:

> The basic dilemma facing the intelligence community, the Executive branch and this Committee is not just whether secrecy and democracy are compatible, but whether maintaining secrecy at any cost can undermine the national security, the enforcement of the espionage statutes, and the general administration of justice. In the words of one Justice Department official who testified before the Subcommittee, 'To what extent must we harm the national security in order to protect the national security?'

So far as I know nobody disputes the proposition that excessive secrecy can threaten the public interest, and therefore what is identified as the central issue is really not an issue at all. Moreover, the testimony of the Justice Department witness is quoted out of context. When that witness asked rhetorically "to what extent must we harm the national security," he was referring to the harmful effects of the disclosures often required by the judicial process, not to the harmful effects of undue secrecy.

A related objection to the draft has to do with its finding that control over the use of classified information in criminal investigations and prosecutions is a matter of "very deep-seated conflict" between the Department of Justice and the intelligence community. See pages 8-9. While it is correct to say that the handling of such information is often a matter of discussion and sometimes a matter of debate, the usual result is an accommodation, as the Director testified, rather than an impasse, as the draft implies. See page 4. Overall, I believe that the draft creates a misleading impression, not justified by the testimony of either the Director or the principal Justice Department witness, about the nature of the relationship between the Department and the intelligence agencies.

The Major Conclusions

I have a quarrel with each of the four major conclusions that are summarized on pages 4-6 of the draft and that I will now take up in order.

First Conclusion: "There is a major breakdown in the administration of the criminal espionage statutes in leak cases." The items of evidence offered in support of this conclusion are (a) there have been no successful prosecutions; (b) few cases are even reported to the Department of Justice let alone investigated or prosecuted, and (c) there is a "nearly unanimous assessment that at least some leaks violate existing statutes and cause serious harm to our national security."

The prototype leak involves an unauthorized disclosure of classified information to the press. I am not aware of any "nearly unanimous assessment" that such conduct is punishable under "existing statutes," and certainly I am not a part of any such consensus.

Putting aside for a moment 18 U.S.C. §798, which is applicable only when communications intelligence or cryptographic information is disclosed, the only criminal statutes even arguably applicable in typical leak cases are 18 U.S.C. §793, subsections (d) and (e). The draft contains no analysis of these statutes, notwithstanding the fact that Professor Benno C. Schmidt, Jr., cited elsewhere in the report as one of the nation's leading experts on the espionage laws, has denounced them as being "vague," "baffling" and "remarkably confusing," has concluded that they were never intended by Congress to apply to the acts of unauthorized disclosure that are characteristic of most leaks, and has suggested that in any such attempted application they would be declared unconstitutional. See "The Espionage Statutes and Publication of Defense Information," 73 Columbia Law Review, 929, 998-1057 (1973).

It is unclear whether 18 U.S.C. §793(d) and (e) are among the statutes as to which the draft report claims that there has been a breakdown in administration. If they are not included, the draft report should say so, and in fairness it should also specify the other statutes beside 18 U.S.C. §798 to which the claim of maladministration relates. On the other hand if 18 U.S.C. §793(d) and (e) are included in the claim, then the report should surely contain an analysis that develops the meaning of these statutes and demonstrates that, contrary to the views set forth in Professor Schmidt's commentary, they are understandable and applicable in regard to leaks. Such an analysis seems to me to be a necessary predicate for any allegation respecting an administrative breakdown, because absent such an analysis it is not evident that there is anything relevant and available to administer.

If the discussions under this heading of the draft report were confined to cases involving apparent violations of 18 U.S.C. §798, it would be far less troublesome. Even here, however, there is no analysis of the statute in the draft report, and the difficulties in the way of prosecution are glossed over with the comments that Section 798 "protects communications intelligence 'sources and methods' in a manner similar to that of the British Official Secrets Act" (see page 8) and that it "approaches the [British Official Secrets Act] strict liability criminal standard." See page 11. No mention is made of the fact that under the British scheme, witness the so-called ABC trial now in progress in London, prosecutions involving sensitive national security information are held in camera, which of course is not a transferable procedure given the public trial guarantees of the Sixth Amendment. Nor does the draft explain the "strict liability" standard said to be embodied in Section 798. If the thought is that proof of a Section 798 violation requires the government to establish only that the information involved falls within one of the four defined categories and that it is properly classified in a technical sense, i.e., bears the correct markings affixed by an authorized official, and that the government need not also demonstrate that the classification is valid on substantive grounds and need not submit to discovery on that issue, the interpretation is questionable as a matter of law. Even if such an interpretation were legally sound -- and there is no published judicial decision on this point -- as a practical matter the Department of Justice would not undertake a Section 798 prosecution unless it were in a position to offer proof on the merits of the classification question. Therefore, the danger that a prosecution would compound the damage already done by the compromise is just as real in Section 798 situations as it is in other cases. The draft report tends to obscure this reality. Moreoever, while roughly half of the leak cases reviewed by the staff evidently involved information covered by Section 798 (see page 11), the incidence of such leaks as a percentage of all damaging national security leaks would be relatively low, meaning that a more effective administration of that statute, even accepting the criticisms in the draft, would not represent much of an advance.

Second Conclusion: "Congressional efforts to remedy this breakdown should first be directed at improving the administration of current statutes; Congress should defer consideration of new criminal sanctions until enforcement problems are eliminated or substantially reduced." This conclusion flows from the first one and is supportable, if at all, only on the theory that "current statutes," unidentified in the draft except for Section 798, proscribe the conduct normally associated with leaks. As already noted,

this theory is not sustained by any analysis in the draft report, and it flies in the face of the interpretations of the espionage laws favored by the commentator that the draft report acknowledges as a leading expert in the field. Further, in my opinion the recommendations appearing in the end of the report, even if adopted, would not materially reduce the enforcement problems connected with the use of national security information in criminal proceedings, and if I am right about that the net effect of this conclusion will simply be to defer still further the already too long deferred reconsideration and overhaul of the espionage laws

Third Conclusion: "Disagreements over the use of classified information also impede classical espionage prosecutions." It is quite true to say that espionage prosecutions of the type to which this conclusion refers, namely ones involving clandestine dealings with foreign agents, can be greatly complicated by the disclosure requirements imposed by the judicial process. It is not true to say, however, at least within the range of my own experience, that the resulting complexities often lead to decisions not to prosecute. See page 14; also page 40. On the contrary, all espionage cases of this type with which I am personally familiar, namely those of direct concern to CIA over the past two and a half years because of demands for Agency information and witnesses, have been successfully prosecuted.

Fourth Conclusion: "The impasse over the use of classified information occurs in other types of criminal cases and at times defendants may have placed the Department of Justice at a marked disadvantage because of this dilemma in perjury, narcotics, and even murder cases." Here again it is quite true to say that problems akin to those that arise in espionage prosecutions can and do arise in the prosecution of other crimes. These problems are inescapable unless intelligence values are always to be subordinated to law enforcement values whenever the two come into conflict. Most frequently our exchanges with the Justice Department result in agreement as to how best to proceed in these circumstances, and not in the impasse that the draft report suggests as the typical outcome.

The Recommendations

Because the recommendations contained in the draft report are based upon conclusions with which I largely disagree, I doubt that even if adopted they would have a significant ameliorating effect. I am also far from being persuaded about the appropriateness or the benefit of either the proposed omnibus pre-trial procedure (recommendation VII) or the proposed revision of the states secret privilege (recommendation VIII). However, I am open-minded on this score and can assure you that any recommendations endorsed by the Committee will receive the most careful consideration.

Miscellaneous Comments

A statement on page 49 of the draft report suggests that the Director should share authority with the Attorney General to halt the investigation of a criminal case. I doubt that you want to include such a statement, as it would appear to represent a step backward in the direction of the 1954 agreement.

The Memorandum of Understanding described on page 38 as being in the developmental stage has in fact been signed by both the Attorney General and the Director. A copy is enclosed. A few possible revisions of this agreement are now under study both by the Department and the Agency, and we should have a final resolution of these considerations within a week or 10 days.

The discussion of the Moore and Boyce/Lee cases on pages 1415 is not factually accurate in several respects. I would be happy to sort out the discrepancies either with you or Keith Raffel on the phone.

The list of a defendant's discovery entitlements at page 19 is not complete. It should include the other important categories of information for which provision is made in Rule 16(a) of the Federal Rules of Criminal Procedure, particularly the items made discoverable by Rule 16 (a)(1)(C).

Frivolous discovery motions are not a genuine aspect of the problem, and mere threats to disclose sensitive information do not preclude prosecutions, as implied on pages 1920. Neither is there any reluctance to resist such motions or threats on relevance grounds, as is suggested on page 51. On the contrary, relevance objections are commonplace in connection with such tactics. The dilemmas occur when the government has a compelling need to use sensitive information as part of its affirmative proof or when a defendant has a legitimate right to obtain or disclose such information in his own defense.

I question the relevance of some of the case histories summarized on pages 22-31, including the Watergate episode, which in my view sheds little if any light on the subject and which can serve only to sensationalize the discussion. I also question whether in some instances, notably the bribery case outlined on page 22 and the Nha Trang murder case outlined beginning on page 26, the pertinent facts have been carefully and properly documented.

As with any governmental functions that are as difficult to perform as the reconciliation of national security interests

and law enforcement interests, it is always tempting to believe that better results could be achieved by reforming the process of decision. But adding more levels to this process in the present context, whether they be bureaucratic, as seems to be intended by the comment on page 4 that "there is no formal mechanism to weigh the risks of additional disclosures against the benefits of prosecution," or judicial, as seems to be intended by recommendations VII and VIII, won't make the dilemmas go away or become any easier to solve. The hard choices will still have to be faced, and there is no particular reason to think that any new process will be any more or less error-free than the one that exists today.

Needless to say, I would be pleased to meet with you again to elaborate on all this if you believe that another meeting would serve any useful purpose.

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Best regards,

[redacted]

Anthony A. Lapham

Enclosure

cc: Robert L. Keuch, Esq.
Deputy Assistant Attorney General
Criminal Division
Department of Justice

OGC:AAL:sin
Original - Addressee
1 - OLC
1 - OGC

MEMORANDUM OF UNDERSTANDING

Procedures for Reporting Violations of Federal Law as Required by 28 U.S.C. § 535

1. Taking cognizance of the statutory responsibility of the Director of Central Intelligence to protect intelligence sources and methods from unauthorized disclosure and taking note of the security problems of the CIA, I hereby establish the following procedures by which CIA shall report violations of Federal law as required by 28 U.S.C. § 535 and Executive Order 12036. This Memorandum of Understanding is issued pursuant to authority conferred by 28 U.S.C. § 535(b)(2) and E.O. 12036, §§ 1-706, 3-305, and supersedes any prior agreements or guidelines.

2. When information or allegations are received by or complaints made to the CIA that its officers or employees 1/ may have violated a Federal criminal statute, CIA shall conduct a preliminary inquiry. Such an inquiry, normally conducted by the Office of the Inspector General or Office of Security and reviewed by the Office of General Counsel, will determine if there is any basis for referral of the matter to the Department of Justice. The inquiry will not, however, seek to establish all necessary elements of the possible violation as a precondition to reporting the matter to the Department of Justice expeditiously.

3. If, as a result of this preliminary inquiry, there is a basis for referral to the Department of Justice and CIA desires to conduct a more extensive investigation for administrative or security reasons, it will so inform

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1/ For the purposes of this memorandum, the phrase "CIA officers and employees" includes all persons defined as employees by E.O. 12036, § 4-204. It also includes a former officer or employee (a) when the suspected offense was committed during his Federal employment and (b) when the suspected offense, although committed thereafter, is connected with his prior activity in the Federal service (see, e.g., 18 U.S.C. § 207).

the Department of Justice to ensure that such investigations do not jeopardize the Government's criminal investigation or prosecution.

4. A basis for referral shall be deemed to exist and the matter shall be referred to the Department of Justice unless the preliminary inquiry establishes in a reasonable time that there is no reasonable basis for belief that a crime was committed. Referrals shall be made in the following manner:

(a) In cases where no public disclosure of classified information or intelligence sources and methods would result from further investigation or prosecution, and the security of ongoing intelligence operations would not be jeopardized thereby, the CIA will report the matter to the cognizant office of the Federal Bureau of Investigation, other appropriate Federal investigative agency, or to the appropriate United States Attorney or his designee for an investigative or prosecutive determination. 2/ CIA officers or employees who are the subjects of such referrals to any component of the Department of Justice may be identified as John Doe # _____ in any written document associated with the initial referral. The true identities of such persons, however, will be made available when the Department determines such to be essential to any subsequent investigation or prosecution of the matter so referred.

A record of such referrals and the action subsequently taken to dispose of the matter shall be maintained by the CIA, and on a quarterly basis, a summary memorandum indicating the type of crime, place and date of referral and ultimate disposition will be forwarded to the Assistant Attorney General, Criminal Division, or his designee. Referrals made by CIA covert facilities to United States Attorneys,

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2/ This reporting requirement applies to all matters except cases involving bribery or conflict of interest, which shall be directly referred to the Criminal Division.

the FBI or other Federal investigative agencies will also be included in the quarterly report with due regard for protection of the security of said installations.

(b) In cases where preliminary investigation has failed to develop an identifiable suspect and the CIA believes that investigation or prosecution would result in public disclosure of classified information or intelligence sources or methods or would seriously jeopardize the security of ongoing intelligence operations, the Criminal Division will be so informed in writing, following which a determination will be made as to the proper course of action to be pursued.

(c) In cases where preliminary investigation has determined that there is a basis for referral of a matter involving an identifiable CIA officer or employee to the Department of Justice, the future investigation or prosecution of which would result in the public disclosure of classified information or intelligence sources or methods or would seriously jeopardize the security of ongoing intelligence operations, a letter explaining the facts of the matter in detail will be forwarded to the Criminal Division. A separate classified memorandum explaining the security or operational problems which would result if the information needed to prove the elements of the offense were made public or which could result from a defense request for discovery under Rule 16 of the Federal Rules of Criminal Procedure shall also be forwarded to the Criminal Division, if requested. Such officers and employees may be designated as John Doe # _____ under the conditions and limitations set forth in paragraph 4(a), above.

In reporting such matters, the CIA shall inform the Criminal Division of the steps it has taken to prevent a recurrence of similar offenses, if such action is feasible, as well as those administrative sanctions which may be contemplated with respect to the prospective criminal defendant.

The Criminal Division, after any necessary consultation with CIA, will make a prosecutive determination, informing the CIA in writing of such determination.

5. The CIA may take appropriate administrative, disciplinary, or other adverse action at any time against any officer or employee whose activities are reported pursuant to this Memorandum of Understanding, but shall coordinate such actions with the appropriate investigative or prosecutive officials to avoid prejudicing the criminal investigation or prosecution.

6. While requiring reports to the Criminal Division to be in writing, the nature, scope and format of such reports may vary on a case-by-case basis depending upon an assessment by the CIA and Criminal Division of the nature of the matters which are being reported. Matters not readily resolved by reference to the foregoing guidelines will be handled on a case-by-case basis, as the need may arise, consistent with the provisions of 28 U.S.C. § 535 and E.O. 12036.

7. The Director of Central Intelligence, whenever he believes security or other circumstances warrant, may make a direct referral to the Attorney General of any matters required to be reported pursuant to this Memorandum of Understanding, in lieu of following the reporting procedures set forth herein.

Date: July 8, 1978

Griffin B. Bell
Griffin B. Bell
Attorney General

Date: July 11, 1978

Stansfield Turner
Stansfield Turner
Director
Central Intelligence Agency

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